United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

540

Brief for Appellant Francis Wells

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,826

UNITED STATES OF AMERICA

v.

FRANCIS WELLS, Appellant

Forma Pauperis Appeal from a Judgment of the
United States District Court for the District of Columbia

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying to the defense the opportunity to impeach the credibility of Government witnesses and to lay a foundation for a motion to dismiss the indictment when the defense offered to prove that the police decision to charge appellant, rather than complainant, was based on the wholly extraneous fact that appellant was wanted on an unrelated homicide warrant; that appellant was never given a preliminary hearing on the charges herein because of prosecutorial preoccupation with the homicide charge which was dismissed after

Government delays and continuances; and that the prosecutor inhibited the grand jury's full consideration of this episode by domination of the grand jury proceedings by excessive leading questions of witnesses and by never asking the grand jury to consider indictment of the complainant for stabbing appellant with a long-bladed knife and for carrying a concealed dangerous weapon.

2. Whether the trial court erred in denying appellant's motion for judgment of acquittal when there was not one iota of evidence corroborating the testimony of the complainant that he was robbed and cut; when neither the money allegedly taken, the weapon allegedly used, nor the complainant's clothes allegedly ripped were produced by the Government; when the Government failed to produce any evidence of the weapon's allegedly dangerous nature except for the complainant's testimony; when essential aspects of the complainant's testimony were internally conflicting and contradicted by police testimony and by objective, non-testimonial evidence; and when the complainant had a great personal interest in the outcome of the trial since the evidence at trial supported the defense theory that the only criminal conduct involved in this episode was the complainant's unprovoked and drunken assault upon appellant with a long-bladed butcher knife which the complainant always carried with him in a homemade sheath designed for quick deployment of the knife.

3. Whether giving <u>any</u> form of the "Allen" charge was, <u>per se</u>, reversible error after the jury had repeatedly stated that it was deadlocked, three times in writing and once personally in open court;

when the jury had already been twice returned to the jury room for further deliberations totalling three and one-half hours after a trial involving less than five hours of testimony; when the Court had already acknowledged after receipt of the second jury note than an "Allen" charge was not appropriate in this case because credibility of witnesses was the simple and basic issue; and after the jury foreman had forecast that any verdict would be a result of improper compromise when he stated in open court, after sending the second jury note, that he doubted "the extent to which we would agree if we could finally reach a verdict."

4. Whether the "Allen" charge which was given over strenuous defense objections after the third jury note was improper, unduly coercive, and constituted reversible error because, among other reasons, the charge as given focused improperly on the jury minority by omitting any instruction to the jury members in the majority that they should consider the correctness of the doubts or judgments of the minority; and because the verdict reached after the "Allen" charge was demonstrably an improper jury compromise.

STATEMENT PURSUANT TO LOCAL RULE 8(d)

The subject matter of this appeal has not previously been before this Court.

REFERENCES TO RULINGS

No written or oral opinions have been rendered by any Court in this proceeding, except for oral rulings during trial which are contained in the record.

STATEMENT OF THE CASE

On September 2, 1969, a jury found appellant Francis Wells guilty on two counts of a three-count indictment. He was found not guilty of armed robbery, but he was found guilty of robbery (22 D.C. Code Section 2901) and assault with a dangerous weapon (22 D.C. Code Section 502). On November 25, 1969, the District Court entered a judgment of conviction and sentenced appellant under the provisions of the Youth Corrections Act (18 U.S.C., Section 5010(b)). Also, on November 25, 1969, the District Court authorized appellant's appeal in forma pauperis. On December 31, 1969, the original record of the proceedings below was docketed in this Court. On April 20, 1970, the District Court entered an Order permitting appellant's conditional release from custody during the pendency of this appeal. On May 28, 1970, pursuant to motion by counsel in the District Court, a supplemental record was docketed in this Court.

I. THE GOVERNMENT'S EVIDENCE [1/]

The Government sought to prove that on January 10, 1969, at about 4:30 to 4:45 a.m., Mr. Marion D. Russell, the Government's

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1/ Abbreviations used herein are as follows: Gov't. (Government), Exh. (Exhibit), Wells (Defendant-Appellant Wells), Tr. (Trial Transcript Volume I, August 27, 28 and 29, 1969), II Tr. (Trial Transcript Volume II, September 2, 1969), Supp. Rec. (Supplemental Record).

complaining witness, was assaulted with a knife and robbed of $57 by appellant Francis Wells and one Larry Parker, co-defendant at trial.[2/]

A. Testimony of the Complaining Witness.

Mr. Russell testified that on the evening of January 9, 1969, he reported to Anna Maria's restaurant for work after having something to drink but when told his services were not needed that evening he went upstairs in the restaurant and slept. He could not recall when, in the early morning hours of Friday, January 10th, he awoke, but he claimed that he left Anna Maria's to find a drink and that we went directly to Blackie's Shoeshine Parlor, a conceded "bootleg joint" on Seventh Street, N.W., a short distance south of Florida Avenue. (Tr. 23-30).

Russell thought he got to the bootleg joint about 4:00 a.m. but that the establishment would sell him no liquor. He testified that while in the establishment he was propositioned by a young woman, that his response was, "No, I don't want to go with you," but that he did show her a wad of money. (Tr. 25-29, 32). On cross-examination he was impeached with his preliminary hearing testimony that in response to the girl's offer he stated "Yes," that he would go with her, but that he left by a rear door after

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2/ Larry Parker was convicted of robbery and has not filed an appeal.

changing his mind (Tr. 64). On re-direct examination, he indicated that his decision not to go with the woman was based on her looks (Tr. 75).

Russell testified that he left the bootleg establishment by the rear door at about 4:15 a.m. and walked north on Seventh Street a short distance to the Wings and Things restaurant located at the northwest corner of Seventh Street (Georgia Avenue) and Florida Avenue (Tr. 30-32). He testified that he went to the front door of the restaurant and was told he could not enter because it was temporarily closed for clean-up activities. He stated that as he turned to leave he was tackled, football style, by a person he identified as Larry Parker (appellant's co-defendant at trial), and that a second man identified as appellant joined Parker in trying to get money out of Russell's pocket. (Tr. 32-37). Russell testified that appellant had "one of those big knives with a switch-blade on it" and that in the struggle appellant "knifed my leg through my pants," causing Russell to "bleed a little bit there" but that stitches were not required (Tr. 37). Russell claimed that during the scuffle Mr. Parker "took some money from my right-hand topcoat. I had that little roll and he had seen the money in the right-hand pocket of my topcoat when he tore the pocket." (Tr. 38-39, emphasis added).

Russell's narrative of the incident continued with his claim that "$57 and some change" was removed from his pocket and that during the scuffle Wells said, "I'm cut." Russell claimed that he did not know appellant was cut until he heard this statement. Russell continued by

testifying that during the scuffle he had taken the knife away from appellant and that as his two assailants left, Russell crossed the street and "took the knife and threw it into that field over there," referring to a vacant lot across Seventh Street, where he said the two men had gone. Russell insisted that during the incident he forgot about the butcher knife in his pocket. (Tr. 39-40).

After the scuffle Russell said that he crossed to the other side of the street to call the police, but he later revised his testimony to state that mid-way in crossing Seventh Street a third man came toward him and threatened to hit him. At this point Russell testified that he began to run with the third man chasing him, and that he ran across the vacant lot to T Street and west on T Street to Fourteenth Street where he flagged down a D.C. Transit bus by running in front of the bus with both hands in the air. Russell thought that he lost the man who he claimed was chasing him at about Tenth and T Streets, but that he was not sure because, "I was running so fast that I didn't have much time to look back around." (Tr. 40-44). Russell testified that he rode the bus from T Street to K Street where he got off and ran into the Hamilton Hotel. He testified that he went into the hotel because a policeman was there, that he told the policeman that he had just been robbed, but that he, rather than the policeman, used the phone to call other police. Two policemen arrived at the hotel; Russell told his story to these officers; and they took him to the 1800 block of Seventh Street "where the accident was." At this location Russell was turned over to Officer Baker of the

Thirteenth Precinct because the officers who had transported Russell were then beyond the limits of their territory. (Tr. 44-46).

Russell entered Baker's car and they proceeded to Freedmen's Hospital after Baker learned that a cutting was involved in the incident. (Testimony of Baker, Tr. 78-79). At the hospital Russell pointed out Larry Parker and appellant as the men who committed the alleged robbery. Russell also testified that at the hospital he recognized the girl who had propositioned him. (Tr. 46-49).

Russell claimed that while at the hospital he had forgotten about having the butcher knife in his pocket but that the people who were at the hospital with appellant made a "commotion" about the fact that Russell had a knife, at which time Officer Baker requested it and Russell handed it to Officer Baker. Officer Baker testified that he did not see exactly where Russell kept the knife but that he thought it was in the "right-hand side of the coat, and Officers Baker and Brunson described the knife as having a blade about six inches long, a wooden handle, encased in a "homemade sheath" constructed of a flattened tin can lined with gauze and vaseline (Gov't. Exh. 2). (Tr. 50-53, 83-84, 90-91, 113-114).[3/] At the outset of his testimony Mr. Russell had stated that he was a kitchen worker and butcher and that he always carried what he called a "boning knife" because he needed it for his work (Tr. 25). Mr. Russell gave an in-court demonstration of his expertise with the

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3/ The Government did not produce the sheath although both the knife and the sheath were taken by the police (Tr. 93-94).

knife and how to use it, stating, "You keep the knife down. You never hold a knife up or you never hold a knife on end like this. You always have to hold it like this so you can slide the knife along." (Tr. 53).

B. Impeachment and Contradiction of the Complainant During the Government's Case.

On cross-examination Russell admitted that although he was at Freedmen's Hospital shortly after this incident he told no one about his allegedly cut leg (Tr. 57). In their testimony neither Officer Baker nor Officer Brunson mentioned being told by Mr. Russell on the morning of the incident that he had been cut and, as already noted Mr. Russell's pants, which would have been bloody and had a hole in them if Russell had been cut as he claimed, were not produced by the Government. The only police testimony concerning the pants was that on the morning of the incident Mr. Russell had told the police that his money had been taken from his pants pocket and that Mr. Russell directed the attention of both Officers not to a hole or blood caused by a knifing, but to his torn right front pants pocket (Baker: Tr. 79-80 , Brunson: Tr. 102-103), a direct contradiction of Russell's trial testimony that he had been cut in the leg and that his money was taken from his coat pocket which had been torn in the scuffle (Tr. 39; supra, p. 6).

At trial the Government produced neither the coat nor the pants and Government counsel showed concern over not being able to produce the pants as evidence. After Russell had testified that he turned in the pants to a desk clerk at the Thirteenth Precinct a day or

two after the incident (Tr. 53-54), Government counsel directed specific questions to Officer Brunson concerning police precinct procedures for property receipts and custody. Officer Brunson testified that he had checked with precinct personnel, that the pants could not be found, and Officer Brunson admitted that there was not even any record at the Precinct of the pants being turned in. (Tr. 103, 112-113, 119-120).

Although Russell testified that he told the investigating police officers that he had taken a large switch-blade knife away from one of his assailants, that he had thrown it toward a vacant lot across the street from the incident, that he was chased by a third man, and that shortly thereafter he gave the police officers a description of this third man (Tr. 39-40, 57, 60-61), Officer Baker, who took the robbery complaint from Russell, denied that Russell told him any of these facts (Tr. 87-88). At trial the Government did not produce the knife allegedly wielded by appellant although it would have been easily found by the police had they been given the information Russell claimed he gave them.

Although some of the foregoing contradictions and conflicts might be the result of totally defective recollection by Mr. Russell, a crucial aspect of his story is contradicted by objective, non-testimonial fact. Mr. Russell claimed that he was chased from the scene of the incident by a third man; that he ran as fast as he could, not even taking the time to look behind him to see if he was still being chased, to Fourteenth and T Streets (about nine to ten blocks from the scene); that he flagged down a moving bus and rode on it about ten blocks to K Street;

that traffic was light; and that he ran directly into the Hamilton Hotel and called the police. (Tr. 40-44, 58-62, 68-69). By contrast, Officer Brunson testified as to the time sequence with the benefit of the transcription of police radio messages following the incident which provided the exact time of all radio messages. (Wells Exh. 1). Officer Brunson acknowledged that at 4:44 a.m. a radio dispatch announced that an ambulance had been requested at 1837 Seventh Street, N.W., due to a "cutting," but that the first police dispatch of a robbery complaint at the Hamilton Hotel was at 5:23 a.m. (Tr. 109). Thus, there was a time lag of at least 39 minutes between the incident when appellant was stabbed and Russell's call from the hotel. In addition, the interval of time between the actual incident and Russell's call from the Hamilton Hotel should be enlarged beyond 39 minutes, perhaps as much as five or ten minutes more, depending on the extent of the delay between the conclusion of the scuffle and the first radio dispatch at 4:44 a.m. due to the passage of time in telephoning for an ambulance and for the police dispatcher to have learned of the request.

The fact that at least 39 minutes elapsed between the incident and Russell's call directly conflicts with Russell's claim that he went directly to the Hamilton Hotel by continuous running and by fortuitously catching a bus. [4/]

4/ See infra, pp. 21-22, demonstrating that during this 40 to 45 minutes Russell did not run from the scene, but rather, that he

- footnote continued -

In addition, after Russell had testified that "$57 and some change" was taken from him he was asked on cross-examination how he made a phone call if all his money had been taken and he lamely answered that at about 4:40 a.m. on a January morning he had found "about ten cents or something that I had picked up off the ground that a customer had dropped there." When pressed for details Russell stated, "I found some change and some pennies there on the ground after we quit scuffling on the ground there." (Tr. 72). This testimony must be compared with Russell's earlier testimony that when the scuffle broke up he ran from the scene as fast as he could while being chased by a third assailant. Officer Brunson testified that although Russell was not searched that morning, the money allegedly taken from Russell was not found on anyone at the hospital (Tr. 114-115, 116). 5/

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waited around the Wings and Things restaurant until it reopened when he went in and had a cup of coffee and that he then left for the Hamilton Hotel. Query: Whether a cup of coffee, and the sight and sounds of ambulance and police vehicles a short distance away responding to appellant's call for help (Wells Exh. 1, Tr. 97-98) sobered Russell sufficiently to cause him to leave the scene, perhaps hurriedly, and to concoct a story that he had been robbed. He must have realized that he would be sought by the police for questioning regarding appellant's stab wound. That Russell was still making up his story as time went on is shown by Russell's contradiction of whether his coat or pants pocket was torn, Officer Baker's testimony that after the incident Russell failed to tell him about taking a knife away from appellant, throwing it in a vacant lot, being chased by a third man or giving a description of the third man. Moreover, Baker testified that he had not been told of the role played by the young woman -- per Russell's version of being "rolled" after showing her a roll of money -- until Russell saw her at the hospital (Tr. 82).

5/ See also the later testimony by a defense witness that Russell had money to buy coffee after the incident and also that the investigating police officers knew Russell had money after the incident (Tr. 199, 203-204).

Finally, there is the conflict between Russell's repeated claim that he did not use his own knife during this incident and the testimony of the two police officers concerning the knife and the circumstances of their obtaining it from Russell. Officer Brunson, whose first contact with this incident was to go to Freedmen's Hospital and take an assault complaint from appellant while appellant's wound was being stitched, testified that he left the hospital to file a written report of the assault at his precinct and that he then patrolled the neighborhood looking for a man fitting the description given by Wells and Parker (Tr. 97-100). He got a radio call to report back to Freedmen's Hospital, and when he arrived the first thing he saw was Russell standing there, fitting the description given by Wells and Parker as the person who had assaulted Wells with a knife (Tr. 100-101). Although Russell clearly fit the description given by Wells and Parker, Officer Brunson did not even search Mr. Russell for a knife or any other weapon. In fact, Russell was not searched by the police at all on the morning in question. (Tr. 114-115). The testimony of Officers Baker and Brunson made it clear that Russell's knife was concealed and that it was not until people who were at the hospital with appellant made a commotion and kept insisting that the officers search Russell for a knife was Russell asked if he had one. At this point Russell took the knife from his person and gave it to one of the Officers. (Brunson: Tr. 103-104, 118-119; Baker: Tr. 81-84, 88-89). Since Russell's knife was concealed on his person, even to the trained eyes of two police officers, how did appellant,

Larry Parker, and the other people with them at the hospital know that Russell had the knife, unless he had used it to stab appellant?

C. Deficiencies in the Government's Evidence.

The only tangible evidence produced by the Government at trial was the long-handled butcher knife retrieved from Mr. Russell on the morning of the incident. In addition to the homemade sheath for Russell's knife, which was not produced by the Government, the Government failed to produce four other items of tangible evidence which allegedly existed in this case, and which bore directly on Russell's testimony:

(1) Russell's pants -- which allegedly would have shown a cut in the leg and blood from the wound Russell claimed was inflicted upon him;

(2) Russell's coat -- which allegedly would have shown a torn pocket as caused by his assailants when they robbed him;

(3) The money allegedly taken from Russell -- which would have strongly corroborated Russell's testimony had it been recovered from either of the defendants or any of their associates; and

(4) The knife allegedly used by appellant upon Russell.

Any or all of these items would have lent at least a scintilla of corroboration to Russell's testimony, but without which the Government's case rested entirely on Russell's credibility.

The homemade sheath in which Russell's knife was kept, which was designed for quick and ready extraction of the knife from Russell's

pocket (for street fighting?) and which was handed to the police officers with the knife, was not produced by the Government, and the Government could give no explanation of its absence. (Tr. 94).

II. EVIDENCE PRESENTED BY THE DEFENSE

A. Testimony.

Russell maintained that after awakening from his sleep at Anna Maria's restaurant he went directly to Blackie's Shoeshine Parlor, and that shortly thereafter this incident occurred; however, a much different and uncontradicted version of his early morning meanderings was provided by the testimony of appellant, the co-defendant Larry Parker, and an employee of the Wings and Things restaurant. Appellant testified that during the altercation at about 4:30 a.m., Mr. Russell was incoherent and while speaking he was spitting in appellant's face (Tr. 159). Co-defendant Parker testified that from his observations Russell appeared to be intoxicated, and that Parker observed Russell both at the time of the incident and prior thereto. An employee of the Wings and Things restaurant, Bernard White, who worked the shift from 9:00 p.m. on Thursday evening, January 9th, until 5:00 a.m. on Friday morning, January 10th, testified that at about 4:15 a.m. Mr. Russell was a customer in the Wings and Things restaurant, that he was drunk at that time, that he was "staggering all over the floor," that he had an argument with a waitress over the payment of his bill requiring the "boss" of the restaurant to get payment from Russell, and that Russell spent part of his time in the restaurant attempting to sell two "brand

new steak knives" which he pulled from his back pocket "still in the wrappers." Mr. White described the knives as "brown handle, stainless steel, with chopped blades," but that they were smaller than the butcher knife Russell carried on his person (Gov't. Exh. 2). (Tr. 191-194). Although Officer Brunson was recalled by the Government as a rebuttal witness to refute certain other aspects of Bernard White's testimony, there was no attempted rebuttal of these facts (Tr. 212-213). During cross-examination Russell was demonstrably defensive and argumentative when it was suggested to him that he may have been at the Wings and Things restaurant earlier in the morning, prior to the incident. That Russell was anticipating the significance of the question and that he attempted to argue with counsel in support of his prior testimony that he went directly from Anna Maria's to the bootleg establishment, is shown by the Court's admonition of Mr. Russell to simply answer counsel's questions and not argue. (Tr. 68-69). 6/

6/ Russell's attempt early in his testimony to minimize the amount of liquor he had drunk prior to the incident by claiming that he had only "a beer" before reporting to Anna Maria's restaurant, that he went directly from Anna Maria's to the bootleg establishment, and that he could get nothing to drink at Blackies, recalls the Shakespearian inference to be drawn when someone protests too much. That Russell could get nothing to drink at Blackies may have been true, but if true it was more likely because Russell was so inebriated that not even Blackies would give him any more to drink. Independent speculation on the subject is, of course, beyond the record facts as provided by Russell; however, it is submitted that an established bootleg joint such as Blackies would soon lose its "good name" if it were to run out of liquor at 4:00 a.m. on a Friday morning, especially if it had to turn down a customer who had a roll of money.

Appellant testified in his own defense, giving a narrative of his activities on the evening of January 9th and early morning hours of January 10th. At about 11:00 p. m. he left a playground, went home to change clothes, left his home and got a shoeshine, and got something to eat around midnight at the Wings and Things restaurant. (Tr. 135-136). He then went to the Village nightclub a few blocks from the Wings and Things restaurant where he met several friends, had a beer, stayed with his friends after the nightclub closed listening to records, and left with his friends at about 4:00 a. m. going north on Seventh Street toward Florida Avenue to get something to eat. They eventually went to the Mile Long hotdog restaurant but when he could not get served appellant went with Larry Parker to the Wings and Things restaurant diagonally across the intersection. (Tr. 136-138).

When appellant and Larry Parker reached the Wings and Things restaurant they were told by Bernard White, an employee, that the restaurant was closed. Conversing through a door which had a missing jalousied window pane, they asked if they could obtain a sandwich through the door and at this time

> [Russell] was like pushing his way into the door, sorta blocking it. So we decided to go over and ask him what was wrong. He went to mumbling something and spitting in my face and I said stay away from me and I was turning back around to the door. That's when he jammed my head into the corner of the door. (Tr. 139).

Appellant added that as he tried to turn around Russell swung at him. "I thought he had hit me and I just wanted to hit him back." Larry

Parker shouted a warning that Russell had a knife, which appellant saw as Russell was preparing to strike a second time, and at this point appellant "started to run across Florida Avenue to Eighth." Appellant then gave more detail:

> By that time, I sorta lost my balance, off my feet. He was attempting to get my arm and my leg. I was seeing that he was drawing back again and I was struggling to run. He struck me when I was trying to run again. I just knew for sure he had stabbed me in my back. I didn't stop to see. He gave me a little chase and my ...
>
> Q. Then he did what?
>
> A. He gave me a little chase. He got half-way across Florida Avenue while I was running.
>
> Q. Then what did you do?
>
> A. Then he went after Larry Parker.

Appellant testified that he was stabbed in the left thigh and he identified Gov't. Exh. 2 (Russell's knife) as looking "exactly like" the knife with which he was stabbed. (Tr. 140-141).

After being stabbed, appellant went to his other friends who were at Seventh and T Streets, one block away. Appellant testified that he had nearly collapsed at that point and that an ambulance was called from a telephone booth next to the shoeshine shop at 1837 Seventh Street. An ambulance took so long in coming that the group hailed a cab to reach Freedmen's Hospital where "they put me on an operating table facing down and sewed me up." (Tr. 143-144). He was given a hypodermic anesthetic and his wound was stitched; however, the first set of stitches did not stop the bleeding so those stitches were removed and he was

doublestitched -- first deep inside the wound to stop the bleeding and then the skin opening was closed with a second set of stitches. The bleeding then stopped. He was also given a hypodermic injection to retard infection, he put on his clothes, got off the operating table and then he passed out. (Tr. 144-146).

Appellant testified that shortly after arriving at the hospital, and while his wound was being cleaned prior to stitching, Officer Brunson arrived. Appellant told Officer Brunson about the stabbing, he gave the Officer a partial description of his assailant, and he asked the Officer to get additional information from Larry Parker. (Tr. 146-149).

On cross-examination by Government counsel (Tr. 149-167), appellant gave an even more detailed recapitulation of the stabbing incident and his activities prior thereto, without impeachment or contradiction.

Appellant denied robbing Russell or having a knife of any kind (Tr. 167).

The co-defendant, Larry Parker, also testified in his own behalf and his testimony corroborated that given by appellant. Parker testified that while he and a group of people were at Blackie's Shoeshine Parlor one of the girls with them, Laverne Miller, told Parker that a man in the back of the establishment "was trying to buy her." (Tr. 179). Parker told appellant, who was engaged in another conversation, that "she was with the man in the back trying to buy her body," but they determined that nothing had come of the situation after learning that the

man "had showed some money" and then left by a rear door.(Tr. 180).

Parker testified that thereafter he and appellant left the establishment seeking something to eat which led them to the Wings and Things restaurant. The only inconsistency between Parker's testimony and appellant's testimony was that although appellant had testified that he went to Wings and Things because the Mile Long restaurant was too full of people, Parker testified that the Mile Long restaurant was closed. Parker's narration of the incident in front of the Wings and Things restaurant, while not a perfectly parallel version of appellant's testimony, was the same in all major details. (Tr. 180-183). Parker corroborated appellant's testimony that Russell was drunk, having observed Russell during the incident and prior thereto at the Shoeshine Parlor (Tr. 182).

It was Parker who sought an ambulance for appellant when there were no cars or taxicabs on the street which could be hailed. Parker finally went to a nearby fire station to get an ambulance, but when he arrived with the ambulance he was told that a taxi had taken appellant to Freedmen's Hospital. Parker and his girlfriend then hurried to the hospital, on foot, and when they arrived a doctor was taking care of appellant's wound. (Tr. 183-185). While at the hospital Russell arrived with a police officer which, according to Parker, surprised him:

> So I just looked at the police and I wondered why, you know, he was looking for the police when he had stabbed that man, you know.

> So the only thing I could figure was the reason why he needed us was just to keep the weight off, because I had insisted on calling the police myself. But the only thing I could figure out the reason why he did that was just to keep the weight off, because he knew he had stabbed a man." (Tr. 185).

The final defense witness was Bernard White, an employee of the Wings and Things restaurant, who appeared pursuant to subpoena issued at the request of appellant's counsel. He corroborated appellant's testimony that appellant had gotten something to eat at the restaurant much earlier in the morning, and he testified concerning Mr. Russell's first appearance at the Wings and Things restaurant in a staggering drunk condition, when Russell had something to eat, made an argument over payment of his bill, and attempted to sell steak knives at about 4:15 to 4:30 a.m. (Tr. 187-190, 191-194). Mr. White then related the incident between Russell, appellant and Parker after the front door of the restaurant was closed for clean-up activities. Mr. White was mopping the restaurant floor when Russell, appellant and Larry Parker came to be on the front step of the restaurant at the same time. Mr. White testified that Russell pushed appellant, that appellant said, "Man, what's wrong with you?" and that Russell "reached in his right-hand back pocket -- right back pocket, and pulled out a knife and stabbed him in the leg." Mr. White continued that at this point appellant asked Russell, "What's the matter?" and that appellant then ran across the street toward a vacant lot near T Street. (Tr. 194-198).

Mr. White stated that Russell then chased Larry Parker

down Florida Avenue, that Russell's hat flew off his head, that he stopped to pick up his hat, and that he came back to the Wings and Things restaurant and again tried to get in. White testified that when some construction workers came to the door in order to get coffee and doughnuts he reopened the restaurant and Mr. Russell came into the restaurant and had a cup of coffee. Mr. White stayed at the restaurant for about 10 or 15 minutes, leaving about 5:15 a.m., his work shift having been completed. (Tr. 198-200). The fact of Bernard White's conviction in 1967 for attempted petty larceny was brought to the attention of the jury by defense counsel (Tr. 200); the Court having previously ruled that Government counsel would be permitted to impeach Mr. White with this conviction (Tr. 169-174).

B. Defense Offer of Proof.

Prior to the beginning of the trial, a conference was held in the chambers of the trial court wherein several matters were discussed, including a preliminary ruling by the Court that certain matters could not be inquired into by the defense during the trial. These matters concerned the determination by the arresting officers to charge the appellant and co-defendant, Larry Parker, with robbery, rather than charge Mr. Russell with the assault (ADW) stabbing of appellant. At the outset of the trial (Tr. 3-5), counsel for appellant made the same request on the record and the Court's ruling was made a matter of record. The Court ruled that none of the factors involved in the police-

prosecutor-grand jury decision to charge the two defendants rather than the complaining witness could be inquired into by the defense at trial, basing his ruling on the technical legal reasoning that once the grand jury indicts, all prior defects in the charging process become irrelevant. However, had this inquiry been permitted by cross-examination of Government witnesses, by other testimony, and by documentary exhibits, counsel for the defense would have established the following as summarized by Officer Brunson in his grand jury testimony: 7/

> I responded to take an assault with a dangerous weapon report from Francis Wells at the time he was in the emergency room of Freedmen's Hospital. I took the report and went back to the 13th Precinct, made the report and proceeded to patrol in my scout car, at which time I was called back to the hospital and I found Officer Baker waiting for me and also the complainant in the robbery case, who is Mr. Russell. At that time Officer Baker informed me that Mr. Russell had been robbed, which I didn't know anything about, and he had taken the witness in the assault with the dangerous weapon report, which is Larry Parker, and placed him in the scout car under arrest for robbery.
>
> So with the conflict of two stories here, I was left -- I didn't know which one to take, so I talked it over with my sergeant and we decided to check records and if no one had any serious offenses on their record I was going to summon them both down to the District Attorney's Office and have a hearing, let him determine what the circumstances were.
>
> After checking with Criminal Records I found that Francis Wells, the individual who was on the table

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7/ Supp Rec. [Grand Jury Testimony of Officer Brunson, pp. 6-7; see also Brunson's Statement to the Grand Jury Secretary; his written report of the assault with a dangerous weapon complaint made by appellant (Police Form No. 251, handwritten), and Brunson's supplementary report (Police Form No. 251, typewritten)].

> being treated for a stab wound, was wanted on a Commissioner's warrant for homicide. This is when I made my decision to make Mr. Russell the complainant.

The unrelated homicide charge, which triggered Officer Brunson's decision as to who should be made the complainant, was finally dismissed on February 6, 1969, after continuances and delays of the preliminary-hearing on the homicide charge by Government counsel beginning on January 10, 1969 and continuing to February 6, 1969 (see Supp. Rec. for Commissioner's Docket No. 32-27 in its entirety).

Appellant never received a preliminary hearing on either the robbery charge or the homicide charge, although a preliminary hearing was held on the robbery charge as to the co-defendant, Larry Parker, the day of the offense -- January 10, 1969 (Tr. 213). On January 23, 1969, midway during the four-week period in which the Government was obtaining continuances of the preliminary hearing on the homicide charge, the United States Attorney's Office sought an indictment from the grand jury on the robbery charge. The grand jury proceeding itself indicates excessively leading questions by Government counsel with both of the witnesses who appeared before the grand jury, Mr. Russell and Officer Brunson. In fact, at only one point in his testimony did Officer Brunson say anything which was not the result of a leading question -- when, in response to a leading question, he insisted that he give a narrative of what happened. (reproduced supra.). Had it not been for the persistent

questioning of a member of the grand jury, no other facts concerning appellant's complaint against Mr. Russell would have been brought out during the grand jury's consideration of this matter. (Supp. Rec., Grand Jury Proceedings, pp. 7-9). 8/

Although the defense proffer was overruled, preventing the impeachment of the police officer's investigative thoroughness and their credibility (and that of the complainant), preventing the defense from showing a grossly arbitrary and capricious "charging process" in this case and preventing the defense from laying a foundation for a motion to dismiss the indictment, Government counsel in his rebuttal closing made this argument:

> Now, we talk about mistakes. Who made mistakes? Did the officer make a mistake? Let's compare -- let's consider who charges people in the District of Columbia. Does a police officer charge people? Can a police officer bring somebody in to the court? Ladies and gentlemen, it's the United States Attorney. The United States Attorney brings the case to the grand jury. The grand jury hears the evidence. And it's the grand jury, the citizens of the District of Columbia, who decide who should be charged and who shouldn't be charged. It's not the police officer out on the beat. (Tr. 273).

8/ An examination of records kept in the Clerk's Office of the United States District Court discloses no grand jury proceeding wherein the complaint by appellant against Mr. Russell for assault with a dangerous weapon was ever presented to a grand jury. Had the defense been permitted to proceed as requested at trial, appellant would have testified that at no time was he requested to testify or give additional information concerning his complaint against Mr. Russell. In fact, the supplemental Police Form No. 251 (typewritten, see Supp. Rec.) prepared and signed by Officer Brunson on January 10, 1969, begins with the statement "Closed this report as unfounded."

In addition to this argument being a grievous misstatement of the actual roles played by police, prosecutors and grand juries in the District of Columbia, the fact that Government counsel felt compelled to prop up the police testimony and to gloss police investigative shortcomings with a legal argument recalling the Court's ruling at the outset of the trial which the jury had not heard indicates the probable significance of these factors from the jury's viewpoint. How much more so had the jury known the real basis for the police decision to initiate the criminal process against appellant and Mr. Parker, rather than against Mr. Russell.

III. GOVERNMENT REBUTTAL EVIDENCE

On rebuttal, Government counsel recalled Officer Brunson who disputed certain parts of Bernard White's testimony. Officer Brunson testified that a day or two after this incident he spoke to Mr. White concerning the incident and that White had told him that he had seen the incident and that Parker had taken money from Russell's pocket and fled, but that White "said he would never testify to that in court." (Tr. 212-213). No rebuttal was offered concerning White's other testimony and on cross-examination of Officer Brunson by appellant's counsel Officer Brunson admitted that he never made a note of this conversation with Mr. White in any of the several police forms he filled out on the case (Police Forms 163, 251, 111, 252, etc.) stating, "That type of information is irrelevant to our report, sir." (Tr. 212-217). Officer Brunson attempted to justify his failure to make any

notation of this conversation on any of the police reports by stating that he did not know Mr. White's name, although he later admitted that he had "walked that beat for approximately six years, and I know the witness, Mr. White, by face." (Tr. 217).

IV. DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL

Although the defense moved for a judgment of acquittal at the conclusion of the Government's evidence (Tr. 129-130), the motion was denied without argument. At the conclusion of all of the evidence the motion was renewed with argument in some detail (Tr. 220-230).

Counsel for appellant noted many of the inconsistencies and contradictions in the Government's evidence, arguing that the jury would have to speculate in order to resolve all reasonable doubts and especially that the jury would have to speculate about whether the complainant's testimony was credible -- there being an utter lack of any corroborating evidence. The trial court was urged to apply a corroboration requirement such as is recognized in certain other classes of cases (i.e. sex crimes) where the testimony of a complainant must be supported by some corroboration because of the possibility, inherent in such cases, that the complainant may have a private interest in diverting attention and perhaps scorn away from the complainant, and as a result, may concoct a story of criminal conduct by the accused. Because Mr. Russell had a real interest (not merely a "possible" interest) in diverting official scrutiny from his own activities and proven

criminal action (carrying a dangerous weapon, if not assault with a dangerous weapon), the Court was requested to enter a judgment of acquittal for lack of any corroboration of Russell's accusations.

Secondly, defense counsel sought a judgment of acquittal specifically on the third count, assault with a dangerous weapon, due to the additional failure of the Government to produce the alleged weapon or any evidence that it was in fact dangerous except for the testimony of Mr. Russell. As with the general motion for judgment of acquittal, this specific motion was based on the necessity of jury speculation in order to find beyond a reasonable doubt the existence of the elements of the crime charged.

The Court reserved ruling and announced that the case would go to the jury.

V. JURY DELIBERATIONS AND THE "ALLEN" CHARGE

Prior to counsel's closing arguments and during a discussion of jury instructions, counsel for appellant made a specific inquiry as to whether it was the practice of this particular trial court to give an "Allen" charge to the jury in the course of the general instruction. The Court indicated that this would not be done and there was no further discussion of the "Allen" charge until during jury deliberations.

At about 4:00 p.m. on Friday, August 29, 1969, the Court concluded its instruction and before sending the jury out for deliberations noted that this was the last case this jury would consider, "this being the

last trial date of this month." (Tr. 297-298).

About 40 minutes later, at 4:40 p.m., the jury foreman sent a note to the Court which stated the following:

> Your Honor:
>
> The jury cannot agree on a verdict.
>
> James G. Ellis
>
> Foreman

The Court brought the jury into the courtroom and verified with the foreman the contents of the note. At this time the Court made the following statement:

> Now, ladies and gentlemen of the jury, we started this case yesterday, this is the testimony, yesterday morning. It's a relatively short case. It's a relatively simple fact situation. As counsel argued to you and as the Court indicated in instructions, it if your responsibility to reach a verdict if you possibly can.
>
> Credibility is the issue here.
>
> Now, you have had the case under deliberation a relatively short period of time, considering that you have had a day and a half of testimony. You have to evaluate all the evidence and attest the credibility of all the witnesses who have testified in your presence.
>
> Now, considering what the defendant has at stake, what the community has at stake, the investment of your time and the Court's time that has already been placed in this case, I am going to ask you to retire to the jury room and continue your deliberation.

Although the Court stated that the case had involved "a day and a half of testimony," this was a slight and, no doubt, an unintentional exaggeration. In fact, the testimony during the trial took less

than four and one-half hours exclusive of recesses, two and one half hours on Thursday morning (Tr. 21-77, 77-126), one hour and forty minutes on Thursday afternoon (Tr. 127-168, 168-210), and only ten minutes Friday (Tr. 211-219), and some of this time was consumed with bench conferences.

After this statement by the Court, the jury deliberated another 45 minutes, until 5:30 p.m., when a second note was received from the foreman. Although this note was subsequently lost and therefore is not present in the record now before this Court, the Court made a statement on the record which may have summarized or paraphrased the contents of the note: "I have received a note from the foreman of the jury saying that they indicate they cannot reach a verdict by further deliberation. I will have to declare a mistrial." (Tr. 299). 9/

After the content of the second note was disclosed to counsel by the Court, Government counsel immediately requested the Court to give the "Allen" charge, adding that "they have not gotten the Allen Charge yet." The Court responded, "No, I don't think that would be

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9/ On May 12, 1970, counsel for appellant prepared and filed in the District Court a "Motion for Preparation and Docketing of Supplemental Record," which included a recitation of counsel's efforts to locate this missing jury note, and sought the assistance of the trial court in locating the note and making it a part of the record herein. Prior thereto, on April 27, 1970, counsel for appellant notified this Court of efforts then underway to locate this missing jury note and to docket a supplemental record which would include the note if it could be found. From the statement of the Court just quoted it is clear that this note was different from the one which preceded it, and from the one which was to follow and which precipitated the "Allen" charge eventually given in this case. Whereas the first and third notes merely stated "Your Honor: The jury cannot agree on a verdict," the second note apparently added that the jury could not reach a verdict "by further deliberation."

appropriate." (Tr. 299-300).

The Court then called the jury into the courtroom and the Court inquired of the foreman if the jury had agreed upon a verdict:

> THE FOREMAN: No, your honor, it has not.
>
> THE COURT: Mr. Foreman, do you believe that given additional time, the jury could arrive at a verdict?
>
> THE FOREMAN: There is some question in my mind about that.
>
> THE COURT: When you say "some question," would you explain.
>
> THE FOREMAN: I think there is a ...
>
> THE COURT: Do you think with additional time, you could resolve that question and arrive at a verdict?
>
> THE FOREMAN: I think I ought to put it this way: There has been a disposition to move in the direction of a verdict since we went back in the second time; but I am not sure at this stage to the extent to which we would agree if we could finally reach a verdict.
>
> THE COURT: Do the other members of the jury agree that with additional time you could arrive at a verdict in this case?
>
> JUROR NUMBER THREE: I don't think so.
>
> THE COURT: Well, we have the alternative -- counsel, come to the bench. (Tr. 300-301).

At the bench conference Government counsel, apparently mindful of the Court's previous statement that the "Allen" charge was not appropriate and that a mistrial would be declared, stated that "we should ask the jury to deliberate further even if you don't give the Allen Charge." Counsel for appellant observed that in answer to the Court's question of all of the jury members, at least two heads shook when asked if they

thought they could reach a verdict given additional time, and that there may have been more than two heads shaking. Government counsel then asked that the jury be brought back the following week on Tuesday morning (Monday being Labor Day). The Court adjourned the jury's deliberations and directed the jury to return at 9:45 a.m. on Tuesday morning to resume (Tr. 301-302).

The following Tuesday at 11:37 a.m. the Court noted for the record that a third note had been received from the jury. This note was identical to the first note which the jury had sent the previous Friday indicating that a verdict could not be agreed upon. The record indicates that counsel had met with the Court in chambers prior to 11:37 a.m. and that the question of the "Allen" charge had been resolved by the Court at that time, that he was going to give the "Allen" charge, but that he would permit defense counsel to state their objections on the record.

Counsel for appellant made a lengthy objection, citing United States v. Fiorvaventi, 412 F. 2d 407 (3rd Cir., June 16, 1969) which flatly decreed that in the future the use of the "Allen" charge in the Third Circuit would be error, normally reversible error. Counsel also objected on the grounds that the "Allen" charge is an intrusion on the privacy of the jurors and deprives a defendant of his constitutional right to a unanimous decision or verdict by the jurors, reached by them individually and without distrusting their own judgment. Counsel also objected on the basis that if given at all, the charge should be given only as a part of the main instructions to the jury, and not as a supplemental,

dynamite charge designed to loosen a hung jury. Counsel for the co-defendant joined in the objection and specifically requested that if the charge were given it include language to the effect that "under no circumstances must any juror yield his conscientious judgment."

The Court stated that while it took judicial notice of the observations of other Circuit Courts of Appeal, this Circuit Court of Appeal had examined the question as recently as 1965 and that the "Allen" charge would be given "exactly as set forth in the Allen Case in the Supreme Court; no more, no less." (II Tr. 3-5). The Court then called the jury into the courtroom and made the following statement:

> THE COURT: Good morning, ladies and gentlemen. I have your note from the jury foreman, Mr. Ellis, which reads that the jury can not agree on a verdict.
>
> I am going to give you one more opportunity to see if you can not reach a verdict conscientiously in this case.
>
> In that connection, I will read to you an instruction which was approved by the Supreme Court of the United States. I will ask you for your very careful attention:
>
> The jury is instructed that in a large proportion of cases, absolute certainty can not be expected. Although the verdict must be the verdict of each individual juror, and not a mere acquiesence in the conclusion of your fellows, yet you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other. It is your duty to decide the case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which makes no impression upon the minds of so many jurors, equally honest, equally intelligent with himself. If, upon the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority.

> I will now ask you to retire and deliberate further and see if you can conscientiously reach a verdict in the light of this last instruction and in the context of all of the instructions that the Court has already given you with respect to the evidence, that you have paid close attention to during the course of this trial.
>
> I will ask you to now retire.

The jury resumed deliberations at 11:44 a.m. and after lunch (the duration of which is not reflected by the record), the jury was given further instructions after a fourth jury note was sent to the Court. The fourth note and the further instructions concerned the second and third counts of the indictment as to whether a defendant could be found not guilty of one and guilty of the other (Supp. Rec., II Tr. 7-8).

Less than an hour later the jury returned a verdict finding appellant not guilty of armed robbery (Count I), but guilty of robbery (Count II) and guilty of assault with a dangerous weapon (Count III). Larry Parker was found guilty only on Count II. The jury was polled, thanked and excused. The defense motion for judgment of acquittal which had previously been taken under advisement was renewed and denied.

SUMMARY OF ARGUMENTS

1. Appellant was denied a fair and reasonable opportunity at trial to impeach the credibility of Government witnesses and to show a grossly arbitrary and capricious charging process. Even assuming, arguendo, that a grand jury indictment establishes probable cause and thereby renders legally irrelevant the reasons for the police decision to charge, the wholly arbitrary and tenuous basis in this case for the original decision to charge appellant rather than the complainant -- that appellant was wanted on an unrelated homicide warrant -- would have been s significant factor in the jury's assessment of the weight to be given all of the Government's evidence, particularly the police hearsay testimony which gave the complainant's testimony the aura but not the substance of corroboration. Defense counsel should also have been permitted to show, by the same evidence, that prosecution of the complainant on charges of assault with a dangerous weapon and carrying a concealed and dangerous weapon, for which there was ample evidence, had been withheld by the Government during a prosecution (of appellant) which was not possible without the complainant's cooperation and testimony. Secondly, in this case the offer of proof was sufficient to establish prima facie grounds for a motion to dismiss the indictment based upon the violation of appellant's right to be presumed innocent, a denial of his right to equal protection under the law, and a denial of his right to be proceeded against only by due process of law. The charging process in this case began with a gross usurpation of prosecutorial functions by the police, and its course thereafter was marked by Government delays and continuances resulting in the denial of appellant's

right to a preliminary hearing, by the usurpation of grand jury functions by the United States Attorney's Office, by a totally defective and sham grand jury proceeding demonstrably and improperly dominated by an Assistant United States Attorney through utilization of excessive leading questions, and by the failure of the prosecutor's office to even suggest to the grand jury that it might consider the indictment of complainant based upon ample evidence of his carrying a dangerous weapon and assault with a dangerous weapon. This Court's supervisory jurisdiction and ultimate control over the police-prosecutor-grand jury continuum of the charging process necessitate the reversal of this conviction with instructions that in the event of another trial the defense offer of proof be permitted as relevant to the question of credibility, impeachment and the weight to be accorded Government evidence, and that the indictment should be dismissed if it is found that any of appellant's basic and fundamental rights were denied as a result of the arbitrary and capricious "charging process" in this case.

2. The defense motion for judgment of acquittal should have been granted because of the utter lack of any corroboration of the complainant's conflicting, contradicted and impeached testimony, and because the complainant in this case had a sufficient interest in the outcome of the trial and a sufficient motive to make a false accusation against the accused so as to require, as a matter of law, that there be at least <u>some</u> corroboration of his accusations before subjecting appellant to the jeopardy of jury consideration on the merits. The requirement of corroboration in

rape cases, and in other cases involving sex crimes, should apply in this case where the complainant had a demonstrable motive for the accusation against appellant in order to protect himself from prosecution. In the alternative, a judgment of acquittal should have been granted as to the armed robbery and ADW counts because the Government's evidence that a knife was used was insufficient as a matter of law.

3. The trial court's decision to give the "Allen" charge in this case, at the time it was given, was reversible error, per se. The clear effect of the charge, apart from its actual content, was certain notice to the jury that it would not be discharged until and unless it reached a verdict. The jury was required to return to deliberations after a three-day weekend and the jurors were held in service beyond their normal one month of jury duty; the "Allen" charge was given after the jury had already deliberated more than three fours following trial testimony consuming less than four and one-half hours; the court had previously acknowledged that this was a simple case involving only an issue of credibility; the jury had already been twice directed to deliberate further after sending notes that a verdict could not be agreed upon; and after the second note the jury was quizzed in open court concerning verdict possibilities. These actions by the trial court and this repetition of requests that the jury reapply itself toward reaching a verdict created the cumulative but clear inference that the jury would not be discharged until they had done so. Moreover, the charge was given even though the court had earlier announced that an "Allen" charge was inappropriate in this case and even though the jury foreman had indicated,

while answering an oral inquiry by the court following the second jury note, that the jury might possibly be able to reach a verdict with further deliberations but that such a verdict would probably be reached in order to satisfy the court's apparent directive to agree or be kept together indefinitely, rather than as the result of full agreement by all twelve jurors. Even if this Court is unwilling to decree that the "Allen" charge has lost its viability and should not be used in any criminal case, as increasingly suggested in recent years by courts and communtators including the Court of Appeals for the Third Circuit and the American Bar Association, under the circumstances of this case the traditional "Allen" charge was inappropriate. Reversible error resulted from its use at all -- regardless of the defects in its contents.

4. The "Allen" charge as given by the court in this case constituted reversible error because it was clearly coercive and directly resulted in an improper compromise verdict by the jury. The instruction as given was fatally defective because, through its rigorous adherence to the guidelines set forth in the Allen case of more than 70 years ago, it focused entirely on the jury members in the minority, suggesting that they distrust their own doubts or judgments, without a comparable admonition to the jury members in the majority. As such the instruction pressured some members of the jury and not others, it was contrary to the recent trend of authority in other circuits which have not yet completely rejected the "Allen" charge, and it encouraged the compromise verdict which was returned -- not guilty of armed robbery but guilty of robbery and assault with a dangerous weapon.

ARGUMENTS

I. THE DEFENSE WAS IMPROPERLY DENIED THE OPPORTUNITY TO PRESENT EVIDENCE RELATING TO THE "CHARGING DECISION" PROCESS.

[Tr. 3-5, 273 and police forms, grand jury testimony, and Commissioner's Docket No. 32-27 (Supp. Rec.)]

The offer of proof made by the defense at trial demonstrates that the police decision to charge appellant with the crime of robbery, rather than charge the complainant with assault with a dangerous weapon, was based primarily on the existence of an outstanding homicide warrant for the appellant. Where, as here, an incident between two persons gives rise to claims by each that there has been a violation of the law by the other, such a decision to charge one and not the other, solely on the basis of an extraneous warrant, constitutes a denial of due process of law, a denial of equal protection of the law, and a denial of the presumption of innocence.

The guarantee of equal protection of the law implicit in the Fifth Amendment right to due process of law proscribes the unequal enforcement of laws. As the Supreme Court stated in Yick Wo v. Hopkins, 118 U.S. 356 (1886):

> Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. 118 U.S. 373-374.

Although good faith by enforcement officers is to be presumed and the burden of proving discriminatory intent is on the complaining parties, Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1917), and although failure to enforce the law against other offenders is insufficient proof of denial of equal protection of the law, an accused who can demonstrate a difference in treatment based on a suspect standard lacking in rational justification is entitled to active judicial scrutiny of such treatment. Washington v. United States, 130 U.S. App. D.C. 374, 401 F. 2d 915 (1968).

A classification is suspect if two factors are satisfied: (1) that the subject matter as to which equality is sought is relatively important and (2) that the particular classification involved is relatively invidious. See Developments-Equal Protection, 82 Harv. L. Rev. 1065 (1969). It is well established that the subject matter in this case, the rights of an accused in the criminal process, is of extreme importance, Griffin v. Illinois, 351 U.S. 12 (1956); and the blatant invidiousness of a classification based upon the mere existence of an unrelated warrant is self-evident from its extraneous and arbitrary nature.

In People v. Harris, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960), an appellate court reversed a trial court's ruling that evidence similar to that offered in this case was inadmissible. In Harris, the evidence showed that only Negroes were charged with the crime of gambling and that gambling by whites was unprosecuted. The appellate court in Harris held that such evidence was relevant to the establishment

of a defense based on a denial of equal protection of the laws in that the classification and law enforcement on the basis of race was suspect. In the instant case the decision to charge the appellant was based on an extraneous outstanding warrant for another crime. The warrant bore no relation to the issue of whether to charge appellant or the complainant and reliance upon this classification for resolving the issue of whom to charge was irrational and arbitrary. The trial court herein should have allowed the introduction of evidence which would have established such irrationality and which would have formed the basis for a defense that prosecution of the appellant for robbery was a denial of due process, equal protection, and the presumption of innocence.

Although police officers are under a duty to fully enforce the laws, to investigate reported disturbances, and to make every effort to discover the perpetrators of such incidents, they must present all information they gather to the prosecutor for a determination by him of the appropriateness of involving the criminal process. Goldstein, Police Discretion Not To Invoke The Criminal Process, 60 Yale L. J. 543 (1960). Near total reliance by police on the irrelevant factor of an outstanding arrest warrant is a violation of such investigatory duty and, together with the usurpation of prosecutorial prerogatives, constitutes abuse of the criminal process. 10/

10/ "The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor." ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Tentative Draft, 1970), §3.4(a), p. 83.

The trial court's rationale for denying the defense offer of proof, that the grand jury charges and not the police (Tr. 3-5), is an unrealistic description of the charging process. The trial court was wrong in not acknowledging that a grand jury in the District of Columbia rarely if ever indicts for "street crime" of violence on its own initiative, and virtually all such indictments are a direct result of a decision to charge by the police and/or the United States Attorney and at their request, instigation or suggestion. The trial court's ruling denying the defense offer of proof looked only at the form of the charging process -- and not at its substance.

This Court should acknowledge the substance of what happened in this case, take note of the actual "charging process" in this city, and rule that at trial the defense was entitled, as a minimum, to underscore the factual weaknesses of the Government's evidence and to display all facets of the question of the complainant's credibility -- even if the evidence was not sufficient to warrant dismissal of the indictment or to raise a legal defense. After all, the police (Government) decision to make Mr. Russell the complainant and thereafter sponsor him as a credible Government witness was not because he was, in fact, credible. Rather, the police determination that he was, in their eyes, more credible than appellant rested wholly on the extraneous knowledge of the homicide warrant.

But even beyond these considerations, the defense offer of proof would have demonstrated for the jury the totality of the complainant's personal interest in this prosecution and the full motivation he had for testifying falsely. The offer of proof would have shown that although ample

evidence existed to support a Government prosecution of Mr. Russell for assault with a dangerous weapon and for carrying a concealed and dangerous weapon, such a prosecution had been withheld. Certainly the defense had a right to show, and the jury had a right to know, that Mr. Russell's testimony was sponsored by the Government during a period of mutual dependency: Russell's own freedom from prosecution and the Government's need for his testimony in its prosecution of appellant. This dependency would have destroyed Russell's credibility without argument if the defense had been permitted to expose it to the jury.

Apart from the aspect of the offer of proof bearing upon the impeachment of the Government's evidence and the complainant's credibility, the proffered evidence establishes prima facie grounds for a motion to dismiss the indictment based not only upon the violation of appellant's rights during the initial charging process at the level of police discretion, but also at the prosecutorial and grand jury levels of the process.

Although without the extraneous homicide warrant appellant may not have been charged at all, if he had been proceeded against without the existence of the warrant the process would have included at least a "hearing" before an Assistant United States Attorney as is customary in cases where both sides in a non-fatal knifing claim that the other committed a criminal act,"[11/] and he would have had a preliminary hearing as did

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11/ This informal hearing was an alternative which Officer Brunson acknowledged in his grand jury testimony (Supp. Rec., pp. 6-7), but which he disregarded after learning appellant was wanted on the homicide warrant.

the co-defendant. However, after appellant's arrest on the robbery charge and the police decision to make Mr. Russell the complainant, appellant was processed on the homicide charge with a virtual prosecutorial abandonment of the robbery charge as to him. Although a preliminary hearing on the robbery charge was held as to the co-defendant on the day of the incident, prosecutorial interest in appellant had focused exclusively on the homicide charge. The Commissioner's Docket which is a part of the supplemental record herein shows that the Government kept the homicide charge alive for several weeks by delays and continuances of the preliminary hearing on that charge followed by its eventual dismissal after the return of a grand jury "original" indictment on the charges for which appellant was tried herein.

Although decided cases on the question of what remedy is available to an accused who was routed through the criminal process without the benefit of a preliminary hearing make it clear that this factor, per se, warrants no judicial relief,[12/] it is not clear that dismissal of the indictment is not an available remedy where avoidance of a preliminary hearing by Government continuances or other delays is coupled with other defects in the charging process equal fundamental or more so, such as the arbitrary charging decision by the police and the lack of an informal hearing before an Assistant United States Attorney. The conclusion of

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12/ See, for example, Ross v. Sirica, 127 U.S. App. D.C. 10, 380 F. 2d 561 (1967); rehearing denied, 127 U.S. App. D.C. 14, 380 F. 2d 561 (1967), and cases cited and discussed therein.

the charging process, the grand jury proceeding itself, demonstrates the cumulative error in the charging process in this case. The transcript of the grand jury proceedings shows excessively leading questions by the prosecutor to the point where Officer Brunson virtually had to insist upon giving a narrative of what happened -- without which the grand jury would not have been apprised at all of the possibility of criminal activity by the complainant. This procedure must be compared with the prosecutor's duty to present evidence to the grand jury which he knows will tend to negate guilt. ABA Standards Relating to the Prosecution Function, supra., §3.6(b), p. 88. There is, of course, no way of determining whether prosecutorial discretion in presenting this evidence to the grand jury included a weighing of the "possible improper motives of a complainant" [ABA Standards, supra., §3.9(b)(iv)]; however, the grand jury transcript which is available shows a lack of prosecutorial concern in bringing such factors to the grand jury's attention.[13/] The absence of any court record that evidence of criminal acts by the complainant was ever brought to the attention of any grand jury raises even graver questions about the cumulation of arbitrary action and/or inaction in the entire charging process in this case (see, supra., pp. 24-25, and fn. 8, p. 25).

13/ To this must be added the great likelihood that the particular prosecutor involved had absolutely no notion of what was involved in the charging process prior to his presentation of this case to the grand jury. As is the practice, his total knowledge of the case was probably derived from the witnesses statements to the grand jury secretary on the day they testified. These statements are included in the Supplemental Record. Nevertheless, the mere complexity of operating a large prosecutor's office cannot excuse a denial of fundamental rights.

Finally, the Government should not now be heard to respond that the defense offer of proof was properly kept from the jury. The incorrect argument which Government trial counsel advanced in his rebuttal closing (see, pp. 25-26, supra; Tr. 273) that as a matter of law "the police officer out on the beat" does not make mistakes which are left uncorrected, contains an implied admission that if such mistakes are not subsequently corrected, a jury should have the opportunity to do so. The defense offer of proof would have identified for the jury a mistake which it could have corrected. Government counsel was obviously attempting, by argument, to create a predicate for the court's standard instruction to be given thereafter that an indictment is not evidence of guilt. The defense should have been permitted to show why, in this case, the indictment was the exact opposite, giving real teeth to the court's instruction, and driving home to the jury how police, prosecutors and grand juries can make mistakes. Only the defense offer of proof could have effectively answered Government's argument that police cannot make mistakes that matter.

Although none of the individual steps taken by the police, the prosecutor and the grand jury in derrogation of appellant's rights to due process, equal protection and the presumption of innocence can be challenged separately by directly relevant case law or other precedent warranting a dismissal of the indictment, when considered cumulatively and as a process laden with error in each of its several steps, judicial intervention is called for. That case law shows a "low judicial visibility" of the charging process prior to trial should not detract from this Court's

legitimate supervision of and concern for the integrity of such processes in the District of Columbia when faced with a litany of defects as shown herein. It is submitted that the trial court's reliance on the technical legal doctrine that an indictment cures all prior errors in the charging process was too superficial a ruling and did not result in substantial justice for appellant, and that even if dismissal of the indictment was not or is not warranted, the defense offer of proof was nevertheless relevant and admissible to impeach the complainant's credibility and to attack the weight of the Government's case against appellant.

II. THE DEFENSE MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

(Relevant transcript and exhibits summarized in the STATEMENT OF THE CASE)

The legal question presented is a simple one: is the testimony of a complainant in a robbery case, demonstrably shaken by impeachment and contradiction through cross-examination, other Government testimony, and by objective, non-testimonial evidence, sufficient for submission to the jury without even a scintilla of corroboration, when the complainant had a proven motive for making a false accusation and where the likelihood of a false accusation was amply demonstrated? It is unnecessary at this point to review the contradicted and uncorroborated state of the Government's evidence both at the conclusion of its case and at the conclusion of all of the evidence, because the Statement of the Case (supra., summarized at pp. 9-15), indicates all of those weaknesses. The legal question,

however, is whether the law should treat this complainant differently than it does in rape cases and other cases involving sex crimes where there must be some corroboration for a complainant's testimony in order for the case to be submitted to the jury. Kidwell v. United States, 38 U.S. App. D.C. 566 (1912); Ewing v. United States, 77 U.S. App. D.C. 14, 135 F.2d 633; cert. denied, 318 U.S. 776 (1943); Calhoun v. United States, 130 U.S. App. D.C. 266, 399 F.2d 999 (1968).

As recently stated by this Court in Allison v. United States, 133 U.S. App. D.C. 159, 409 F.2d 445 (1969),

> It is the law of this jurisdiction that no person may be convicted of a "sex offense" on the uncorroborated testimony of the alleged victim. As a general rule, corroboration is required as to both (1) the corpus delicti and (2) the identity of the accused .... Although the requirement of corroboration as to the identity may be relaxed in certain circumstances, we have never diluted the requirement that the corpus delicti be corroborated. 133 U.S. App. D.C. at 162.

This doctrine has been reaffirmed in recent cases such as United States v. Terry, No. 22,547 (D.C. Cir., January 14, 1970), a rape case, wherein this Court reiterated

> the rationale underlying the corroboration requirement: the desire to protect defendants from the risk of being convicted on fabricated or mistaken charges. (Slip Opinion, p. 5).

The discussion in Terry evidences the general judicial concern over the possibility of injustice where corroboration is lacking for a complainant's testimony, where the complainant may have a possible improper motive due to the nature of the crime charged. The Terry court's discussion

was not focused specifically on the "sex case" nature of the crime therein, indicating at least some judicial preoccupation with a need for corroboration in some criminal cases outside the narrow category of sex cases.

It is submitted that the complainant in this case, Mr. Russell, had an actual motive and a personal purpose far stronger than that regularly presumed of a complainant in a rape or other sex case for fabricating an accusation. In this case the real danger of false accusation based on a real motive was proven -- it was not a mere possibility and it had nothing to do with the category of crime charged. It is not only women and children who may fabricate an accusation in order to divert scorn, criticism, approbrium or prosecution to someone else.

If the corroboration requirement of Kidwell and its progeny is a valid principal, its application in cases such as this one should not be denied where the evidence clearly establishes a strong likelihood or probability of fabricated charges. Rather, the principle should be affirmatively embraced and appellant's motion for judgment of acquittal should be granted on that basis.

Apart from the corroboration requirement, the motion for judgment of acquittal focusing specifically on the weapon counts (armed robbery and assault with a dangerous weapon) should have been granted for the additional reason that even under prevailing standards in non-sex offense cases [Curley v. United States, 81 U.S. App. D.C. 389, 160 F. 2d 229; cert. denied, 331 U.S. 837 (1947)], these counts of the indictment should not have been submitted to the jury because the Government's evidence that

a dangerous weapon was used in the alleged robbery of Mr. Russell was so weak, inconclusive, and non-existent that the jury would have had to speculate in order to resolve all reasonable doubt against appellant. As a matter of law, there was "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt," where an essential element of such guilt was the existence and use of a dangerous weapon in the perpetration of the alleged offense. Curley, 160 F. 2d at 232-233.

III. THE GIVING OF AN "ALLEN" CHARGE, IN ANY FORM, WAS REVERSIBLE ERROR UNDER THE CIRCUMSTANCES.

(Tr. 296-302; II. Tr. 3-10; three jury notes)

The "Allen" charge was inappropriate in this case and its use constituted reversible error. The question of whether an "Allen" charge should have been given at all under the circumstances must be distinguished from the question of whether the content of the charge actually given was defective. This latter question will be treated in Argument IV infra.

In order to understand the effect of an "Allen" charge on the jury in this case, at the time the charge was given, it is necessary to understand the interaction of the court and jury from the time the case was submitted for verdict until the time the charge was given, over strenuous defense objections. The following factors are relevant:

1. After 40 minutes of deliberation, the jury sent a note to the court stating that a verdict could not be agreed upon.

2. In response to the note the court admonished the jury that this was a relatively short case involving a relatively simple fact

situation, that credibility was the issue, that the jury had a responsibility to reach a verdict if it possibly could, and the jury was told to consider "what the defendant has at stake, what the community has at stake, the investment of your time and the court's time that has already been placed in this case."

3. After 45 minutes of further deliberation, a second note was received indicating continued jury deadlock.

4. At this time the court indicated on the record that a mistrial would be declared, and that an "Allen" charge would not be appropriate.

5. The court then brought the jury into the court room and quizzed both the foreman and the other members of the jury, obtain- the frank appraisal of the foreman that a verdict might be possible but he was not sure that all jurors would really agree to a verdict if one were returned.

6. The court then changed its mind about declaring a mistrial and directed the jury to return three days hence, following the Labor Day weekend.

7. After at least 90 minutes of further deliberation, the jury sent a third note indicating continued deadlock whereupon the "Allen" charge was given.

When the charge was finally given, it is unimaginable what more the court could have done to impart certain notice to the jury that it would be held indefinitely if it did not reach a verdict. The cumulative effect of

the court's interaction with the jury during the three hours of deliberations built to a point where the coercive impact of the "Allen" charge could only have been increased by a flat statement from the court that the jury would not be discharged until and unless it reached a verdict. Added to this atmosphere must be the fact that this was a hold-over jury from the month of August, a fact which the jury knew the court was aware of because of the court's mention of it when discharging the alternate jurors. Well into their fifth week of jury service, these jurors were sent back to a jury room for a third time with an ultimatum. By this time the jurors had suffered an intrusion into their independent judgmental process which must be presumed coercive.

This presumption of coercion in this case, because of the peculiarly untoward circumstances of how the jury was handled during its deliberations, finds significant support in decided cases where the "Allen" charge has been discarded because of its inherently coercive character; cases without any particularly compelling factual circumstances such as are present here. And since the early 1960's a growing number of respectable commentators, judges and Bar Association groups have called for the cessation of "Allenizing" hanging juries. In 1959 and 1960, respectively, the States of Arizona and Montana discontinued the use of the "Allen" charge. State v. Thomas, 86 Ariz. 161, 342 P. 2d 197; State v. Randall, 137 Mont. 534, 353 P. 2d 1054, and in 1963 Mr. Justice Clark expressed his view that the "Allen" case was dead law in the following language:

> Nor do we circulate the "Allen Charge" to the new judges as I used to do when heading up the Criminal Division of the Department of Justice. Allen is dead and we do not believe in dead law. Progress of Project Effective Justice -- A Report of the Joint Committee, 47 J. Am. Jud. Soc'y. 88, 90 (1963).

The growing dissatisfaction with the "Allen" charge during the 1960's has found ample expression in the Federal Courts of Appeal. In Thaggard v. United States, 354 F. 2d 735 (5th Cir. 1965), cert. denied 383 U.S. 958 (1966), the majority opinion criticized the "Allen" charge if given in an unmodified form, and Judge Coleman, concurring, ventured his opinion that if the charge "were submitted to the Supreme Court today the results might not be the same as it was in 1896." 14/ It should be noted that the trial court herein gave a completely unmodified "Allen" charge, adhering rigorously to the language in the "Allen" case. Allen v. United States, 164 U.S. 492 (1896). Additional dissatisfaction with the "Allen" charge in the Fifth Circuit has been expressed in Andrews v. United States, 309 F. 2d 127, 129 (1962, Judge Wisdom, dissenting); and in Huffman v. United States, 297 F. 2d 754 (5th Cir. 1962) where Judge Brown, dissenting, noted that,

> Too often, as in these two cases, it was but a matter of a few hours after the jury had retired to deliberate. And not infrequently, as we were led to believe on oral

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14/ A case did reach the Supreme Court for decision that year dealing with the "Allen" charge, Jenkins v. United States, 380 U.S. 445 (1965), wherein a jury instruction "You have got to reach a decision in this case" was ruled coercive (reversing 117 U.S. App. D.C. 346, 330 F. 2d 220 (1964).

> argument of both cases, it occurs with the last jury in the last case at that division point for that particular term. *** In the final analysis the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture on citizenship. If it says more to declare that there is a duty to decide, it is legally incorrect as an interference with that rightful independence. (Emphasis added)

Judge Brown also commented that

> [A]s history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have performed their useful, vital functions in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is secured. 297 F. 2d 754, 759.

In 1967 the Virginia Law Review published a Note examining the "Allen" charge in light of judicial rumblings during the preceeding decade, and evaluating the use of the instruction. Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 Va. L. Rev. 123 (1969). The coercive impact of the "Allen" charge was summarized in the Note as follows:

> [S]ince the majority is not usually urged to reconsider its position, there is an implication, buttressed by the particularly powerful position of the judge giving the instruction, that the majority is correct and that the minority should yield its position and conform to the majority. (53 Va. L. Rev. at 143).

Long before the "Allen" charge was discontinued in Arizona, the sentiment just noted was expressed by Justice Udall dissenting in State v. Voeckall, 69 Ariz. 145, 210 P. 2d 972, 979 (1949), where he noted the likely thoughts

of a minority juror when given the "Allen" charge:

> The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did tell me not to surrender my conscientious convictions, he told me to doubt seriously the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will just have to change my vote.

The view has also been expressed that where an unmodified "Allen" charge is given (wherein only the jury members in the minority are instructed to doubt their own judgments or re-examine their own beliefs), the judge then appears to join the majority faction and thereby lends his prestige to that group. The minority jurors perceive the judge as an expert and defer to his wishes because of his expertise. Once this process is accomplished, the majority jurors have a new weapon in their efforts to persuade the minority -- the outside expertise of the judge. See Note, On Instructing Deadlocked Juries, 78 Yale L. J. 100, 136-137 (1968).

Whether the "Allen" charge is euphemistically termed a "gentle nudge" requiring the jury to bear down and reach a verdict, or whether it is called what it is -- coercion,

> Pressure of whatever character, whether acting on the fears or hopes of the jury, if so exerted as to overbear their volition without convincing their judgment, is a species of restraint under which no valid judgment can be made to support a conviction. No force should be used or threatened, and carried to such a degree that the juror's discretion and judgment is overborne, resulting in either undue influence or coercion. A judge may advise, he may persuade, but he may not command, unduly influence, or coerce. Wissel v. United States, 22 F. 2d 468 (2nd Cir. 1927).

It is, of course, difficult to determine the effect of "Allen" charges upon jurors because of the secrecy of jury deliberations and their prompt escape from the scene after returning the verdict; however, analyses of available data would indicate that "a sizable minority of jurors assent to verdicts with which they disagree." 78 Yale L. J. 109, citing James, Status and Competence of Jurors, 64 Am. J. Sociology 563, 567-69 (1959) wherein research data based on post-deliberation interviews was summarized, demonstrating that ten percent of jurors are willing to admit that they were "pressured" into their verdict, i.e., that they were unconvinced when the vote was delivered. That such was probably the case herein, and that the foreman of the jury believed that this would be the ultimate resolution of the verdict problem in this case was forecast by him when he answered the court's inquiry about the possibility of the jury reaching a verdict in this case. The foreman thought that during the deliberations between the first and second notes there was a disposition on the part of the jury to move in the direction of a verdict, but he added that he was "not sure at this stage to the extent to which we would agree if we could finally reach a verdict," a fairly clear statement that there were jurors in this case who were members of the ten percent who could be pressured into a verdict even though unconvinced when the verdict was delivered.

In August, 1968, the House of Delegates of the American Bar Association approved the draft of Standards Relating to Trial by Jury resulting from the ABA's Project on Minimum Standards for Criminal Justice. Without amendment, the House of Delegates approved §5.4

"Length of Deliberations; Deadlocked Jury," and the extended Commentary thereafter (pp. 146-158), which rejected the use of the "Allen" charge after a careful review of its history and problems:

> For these reasons, the Advisory Committee has concluded that the Allen charge should not be used. It is appropriate, however, for the court to give or repeat to the jury an instruction on its responsibilities in the course of deliberations, as provided in §5.4(b). This may be done when the jury has indicated its inability to reach an agreement or when the jury has deliberated for some time without reaching an agreement.

Section 5.4 of the approved draft provides that before the jury retires for deliberation, the court may give an instruction which informs the jury of its various responsibilities and functions, but which studiously avoids any discussion of a minority or majority within the jury, or how a minority should view or distrust its own judgments in the event of disagreement -- the vice of the "Allen" charge. In addition to a rejection of the "Allen" language dealing with a jury minority, the ABA approved Standard shows a clear preference that any such charge, even without the "Allen" coercive language, should be given in the main body of the court's instruction and later repeated if necessary, but that it should not be held out from the main instruction and given only as "dynamite" once a jury deadlocks.

It is important to note that in the instant case most of the points covered in the charge suggested by the ABA Standards were given to the jury herein by the court following receipt of the first jury note. If the ABA Standards are reasonable and set an outer limit beyond which a court may not go in its quest for a verdict, then the combination of comments made by the court to the jury in this case constituted a double "Allenization" of the jury, once after the first note in relatively uncoercive language, and once after the third note, verbatim from Allen.

It should also be noted that the instruction proposed in the ABA Standards is modeled after one proposed in 1961, Jury Instructions and Forms for Federal Criminal Cases, 27 F.R.D. 39, 97-98, which also avoids the coercive aspect of the "Allen" charge which speaks directly to minority jurors.

After the adoption of the ABA Standards in 1968 both the Third Circuit Court of Appeals and the Tenth Circuit Court of Appeals have concluded that the use of the unmodified "Allen" charge will be considered error, normally reversible error. United States v. Fioravanti, 412 F. 2d 407, 414-420 (1969), cert. denied, 396 U.S. 837 (1970); United States v. Wynn, 415 F. 2d 135 (10th Cir. 1969). In the Wynn opinion, the Court made the following observation:

> Like the Third Circuit, we refrain from reversing for failure to heed our suggestions in Burroughs v. United States, 365 F. 2d 431, 434 (10th Cir. 1966) and we repeated in United States v. Winn [411 F. 2d 415; 10th Cir. 1969]. But we again call attention to the inherent danger in this type of instruction when given to an apparently deadlocked jury and reiterate

> the suggestion that, if it is given at all, it be incorporated in the body of the original instructions. We make this in the form of a suggestion, confident it will be heeded in the conduct of future jury trials. 415 F. 2d at 137.

In the Burroughs decision, the Tenth Circuit had criticized the giving of unmodified "Allen" charges.

In the face of this steadily growing rejection of the unmodified "Allen" charge, in view of the many constructive suggestions put forward for its modification and use in the main body of the charge rather than as a dynamite charge to dislodge a hung jury, and in view of the particularly compelling circumstances presented in this case which show the inappropriateness of any form of the "Allen" charge, its rendition to a hold-over jury after three jury notes, prolonged deliberation, and after the court had already indicated that the charge was inappropriate, was reversible error.

IV. THE "ALLEN" CHARGE AS GIVEN WAS IMPROPER, UNDULY COERCIVE, AND CONSTITUTED REVERSIBLE ERROR UNDER THE CIRCUMSTANCES.

(II Tr. 3-10; three jury notes).

As just outlined in Argument III, the growing dissatisfaction with the unmodified "Allen" charge by courts, commentators and the organized Bar, not only has taken the form of outright rejection of any form of the "Allen" charge, but an even broader base of opinion would require that if used at all, the charge should be modified so as not to speak directly and only to jury minorities. If given at all, it should be given in the main body of the charge so that if it needs repeating later its unduly coercive impact

is minimized to a certain degree by virtue of its being merely a repetition of something the jury already heard and should have remembered if it was listening carefully.

In this case, the trial court's instruction was, as stated by the court, "exactly as set forth in the Allen case in the Supreme Court; no more, no less." (II Tr. 3-5). This determination was made after extensive, on-the-record objections by counsel for appellant specifically citing the Fioravanti case, supra., which noted the invidiousness of the unmodified "Allen" charge which speaks, as it does, only to jury members in the minority. 412 F. 2d 407, 416-17:

> Thus is revealed the very real treachery of the Allen Charge. It contains no admonition that the majority re-examine its position; it cautions only the minority to see the error of its ways. It departs from the sole legitimate purpose of a jury to bring back a verdict based on the law and evidence received in open court, and substitutes therefor a direction that they be influenced by some sort of Gallup Poll conducted in the deliberation room.

Of course, the unmodified "Allen" charge as given in this case contains not just one, but two, directives to the jury minority stated in the reflexive: first, "if much the larger number of jurors are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which makes no impression on the minds of so many jurors, equally honest, equally intelligent with himself," immediately followed by "If, upon the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness

of a judgment which is not concurred in by the majority." Although this alternative type of wording gives the appearance of impartiality, a jury member in the minority heard himself addressed directly, twice, and told both times, as a minority juror, to doubt the validity of his position.

Although the general history of cases decided in this Circuit shows a continuation of approval for the "Allen" charge, there have been some indications that this position is not intractable, especially where the charge is used as "dynamite" to loosen a hanging jury. Kent v. United States, 119 U.S. App. D.C. 378, 343 F. 2d 247 (1964) rev'd. on other grounds, 383 U.S. 541 (1966). As early as 1932, this Court noted that it is "better to avoid ... the practice of supplemental charges." Mendelson v. United States, 61 U.S. App. D.C. 127, 58 F. 2d 532.

That the "Allen" charge as given in this case was the final demise of responsible jury deliberations and independent judgment is evidenced by the inconsistent compromise verdict which was reached. The verdict as to appellant of not guilty of armed robbery but guilty of robbery and assault with a dangerous weapon is inconsistent as a logically certain proposition.

The verdict was inconsistent because the combined elements of robbery and assault with a dangerous weapon include all the elements of the crime of armed robbery; so that if appellant was found not guilty of armed robbery, one of the essential elements of the other two offenses must not have been proven to the jury's satisfaction beyond a reasonable doubt unless, of course, the jury compromised to reach a verdict.

In this case it is not an adequate response to this clearly inconsistent verdict to say that such inconsistency is an approved outlet for jury mercy. There was no way for the jury to know that the possible punishment for conviction on one count would be any greater or lesser than that resulting from conviction on any other count. The jury was not so instructed and any assumption on the matter is wholly speculative at best and only beclouds the much safer assumption, with ample support in the record, that the jury could not agree on a verdict without an improper compromise deriving from the court's "Allen" charge.

As the Third and Tenth Circuits have decreed, it is submitted that use of the unmodified "Allen" charge is error, normally reversible error, and that if a modified version of the charge is employed such as suggested in the ABA Standards, supra., it should be used only in the main body of the court's instructions to the jury. An "Allen" charge such as given in this case was reversible error.

CONCLUSION

This Court is requested to rule that the trial court should have granted the defense motion for judgment of acquittal with remand instructions to dismiss the case. In the alternative, if judgment of acquittal is not ordered as to all counts, the conviction of appellant of robbery and assault with a dangerous weapon should be reversed with directions that the indictment of appellant should be dismissed for the failure of the Government to convince twelve juror's of his guilt beyond a reasonable doubt, and because of the denial of appellant's fundamental rights during

the charging process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of June, 1970, mailed two copies of the foregoing to the Offices of the United States Attorney for the District of Columbia by depositing them in the United States mail, postage prepaid, addressed to John A. Terry, Esquire; Chief, Appellate Section; United States Attorney's Office; Washington, D.C. 20001.

/s/ Michael Valder
Michael Valder

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23,826

UNITED STATES OF AMERICA

v.

FRANCIS WELLS, Appellant

Appeal from the United States District Court for the
District of Columbia

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(Appointed by this Court)

February 24, 1971

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INTRODUCTION

The basic issues in this appeal involve the Allen charge. They are: (1) whether the Allen charge per se, should have been used at all by the trial court, and (2) because of the unique circumstances and chronology of jury deliberations in this case, whether the jury was or may have been coerced into a verdict of guilty by the trial court's use of the Allen charge together with other comments and admonitions after the jury became deadlocked. This appeal presents two other issues not related to the Allen charge.

They will be discussed later.

This appeal was noted on November 25, 1969. Appellant's Brief was filed on June 19, 1970, and it extensively surveyed the recent history of the Allen charge, including the recommendations of the American Bar Association. Oral arguments were heard on January 26, 1971, by a Panel of this Court composed of Judges McGowan, Leventhal and VanPelt (United States District Judge for the District of Nebraska). A Per Curiam opinion was rendered by the Panel on February 10, 1971 affirming Appellant's conviction.

The three-judge Panel is hereby requested to reconsider its affirmance; however, and of even greater importance, is Appellant's instant request that this entire Court rehear this appeal, and that such en banc rehearing be in conjunction with the Court's en banc consideration of two similar cases now before the full Court for decision -- United States v. Anthony C. Thomas (No. 22,768), and United States v. Wilson and Whittaker (Nos. 23,094 and 23,095). These two cases are scheduled for oral argument before this Court, sitting en banc, on February 26, 1971. The instant Suggestion for Rehearing En Banc seeks consideration of Appellant Francis Well's appeal by the full Court at the same time as its consideration of the Thomas and Wilson and Whittaker appeals, and participation in the February 26th oral argument, if possible.*

* Counsel for Appellant Francis Wells appreciate the shortage of time remaining (only two days)before the February 26th oral argument and, accordingly, waive oral argument if the Court determines to consolidate this appeal for rehearing with the Thomas and Wilson and Whittaker appeals, but, because of practical or administrative limitations, cannot arrange for counsel's participation in oral argument. Counsel is now prepared to participate in the February 26th oral argument if so notified by the Clerk's office, and intends to be present whether or not as a participant.

REASONS FOR REHEARING EN BANC

The Thomas and Wilson and Whittaker cases are apparently the vehicles by which this Court will settle the question of whether the continued use of the Allen charge will be permitted in the District of Columbia, and if not, the trial courts in the District of Columbia will be given guidelines as to how deadlocked juries are to be handled, and how they should be admonished, if at all. As this Court has recognized by agreeing to consider these questions, they are of exceptional importance warranting resolution by the full Court. We submit, because of the serious practical and policy questions involved, that the Court should have a broader record before it than presented in the Thomas and Wilson and Whittaker appeals. The record and questions presented in the instant appeal add several factors and circumstances not presented by Thomas or by Wilson and Whittaker, which are frequently present in "Allen charge" cases, and which also ought to be resolved. Such additional factors and circumstances presented in the instant appeal are as follows:

A. Timing of the Allen Charge. In this case the Allen charge was given only after the jury became deadlocked, after three jury notes and return to deliberations twice. In the Thomas and Wilson and Whittaker cases the charge was first given as part of the main body of jury instructions, so that when repeated, after deadlock, as it was in Wilson and Whittaker, it came merely as a reminder of a prior admonition, and as a reminder, comparts partially with the ABA recommendations (Standards Relating to Trial by Jury, §5.4) that, if given at all, this type of instruction be given only in the main body of the Court's instruction,

and not be held out and given only as "dynamite" once a jury deadlocks (See Appellant's Brief, pp. 56-57). In the instant appeal the charge was pure "dynamite" -- the jury hearing it for the first time only after deadlock.

B. Comment or Admonition Beyond the Allen Charge. In this case the trial court gave the deadlocked jury admonitions and comments, in addition to the Allen charge itself. After deadlock in the instant case the court gave its opinion and admonished the jury that this was a "relatively short case," that it involved a "relatively simple fact situation," that the jury had a "responsibility to reach a verdict if you possibly can," that "credibility is the issue here," and that the jury should consider "the investment of your time and the Court's time that has already been placed in this case." Thereafter the jury deliberated further, again sent a note indicating continued deadlock, and was quizzed in open court about verdict possibilities and returned, for the second time, for further deliberations.*

* In its Per Curiam opinion of February 10, 1971, the Panel herein interpreted the answers of the jury Foreman to indicate that the prospects of a verdict had increased, warranting the Court's decision not to declare a mistrial. It is submitted that the Foreman's response did not indicate progress; rather, it indicated that some jurors had begun to buckle under pressure and vote for conviction against their conscientiously held beliefs. The Court's question and the Foreman's answer were as follows:

"THE COURT: Do you think with additional time, you could resolve that question and arrive at a verdict?"

"THE FOREMAN: I think I ought to put it this way: There has been a disposition to move in the direction of a verdict since we went back in the second time; but I am not sure at this stage to the extent to which we would agree if we could finally reach a verdict." (Tr. 300, emphasis added).

Footnote continued on next page.

The Allen charge was given following a three-day weekend and at least ninety (90) minutes of additional jury deliberations. In the Thomas case the trial court gave similar admonitions after deadlock (possibility of a retrial before another jury), but not followed by a reptition of the Allen charge already given in the Court's main instruction. In the Wilson and Whittaker case the "Allen plus" admonition was given (retrial before another jury required) before the Allen charge was repeated.

C. Length of Jury Deliberations. In the Thomas case, the jury had deliberated for one hour when it sent the court its note indicating it was deadlocked, at which point the jury was instructed with the "Allen-plus" language and excused for the day. In the Whittaker and Wilson case the jury deadlocked after six hours of deliberations after a trial which lasted about six and one-half hours. In the instant case trial testimony consumed less than four and one-half hours and the Allen charge was given after three and one-half hours of deliberations (the first jury note indicating

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This response is either ambiguous, warranting no reliance by the Court and required a mistrial, or if not ambiguous it can only mean what it says -- that any verdict would not be based on agreement, but because of pressure to reach a verdict.

The Panel opinion does not answer the question of why a mistrial was not granted after still a third jury note indicating deadlock was sent after at least 90 minutes of additional deliberations following a three-day weekend. If the trial court's decision not to declare a mistrial after the second deadlock was justified because the Court thought the jury was making progress, why was a mistrial not declared four days later when the lack of progress was proven by a third jury note?

deadlock was sent after forty minutes of deliberation, the second note indicating deadlock was sent after another forty-five minutes of deliberation, and the third jury note indicating deadlock, after a three-day weekend recess, was sent after an additional hour and three-quarters of deliberations).

The foregoing comparison of the instant case with the two cases now set for consideration by all of the active members of this Court show that the instant case, while very similar to the Thomas and Whittaker and Wilson cases, presents factors and circumstances not presented in those cases but which, nevertheless, do frequently arise in the trial courts in the District of Columbia, and which ought to be discussed and resolved at the same time this Court resolves the issues and practices presented in the Thomas and Whittaker and Wilson cases.

Apart from the merits of the Allen charge issues, we also submit, with respectful deference to the realities of the administration of this Court's business and the administration of justice in the District of Columbia, that if this Court, in Thomas and Wilson and Whittaker, reverses those convictions but applies its ruling only prospectively, that Appellant Francis Wells should also benefit from such a decision. The instant appeal has been pending in this Court since late 1969, and Appellant Francis Wells has, by the extensive Brief filed on his behalf, raised in this Court the exact same issues and at the exact same time as did the appellants in Thomas and Wilson and Whittaker.

Failure by this Court to apply to Appellant Francis Wells whatever supervisory rule might be adopted by this Court en banc, and failure to consider the record and issues in this case, would be inconsistent with the rationale and doctrine of Gaither v.

United States, 134 U. S. App. D. C. 154, 178, 413 F. 2d 1061, 1085 (1969). In Gaither this Court stressed the importance of giving an appellant the benefit of a supervisory - prospective ruling where the appellant's attorneys have spent considerable time and emphasis upon a novel or potentially disruptive point of law which would not advance their client's interest unless the appellant raising the issue were given the benefit of the prospective or supervisory ruling resulting therefrom.

In this case appellant's Brief was filed on June 19, 1970, without awareness by counsel of the pendency of the Thomas or Wilson and Whittaker cases, and without awareness of the opinion on the same date (June 19, 1970) in United States v. Johnson where a Panel of this Court, while affirming the conviction therein, suggested full Court consideration of the Allen charge, especially in light of the ABA recommendations. While the Appellant's Brief in Wilson and Whittaker cited the ABA recommendations, they were not discussed or amplified upon, and the ABA recommendations were not even cited in the Reply Brief filed in Wilson and Whittaker. The sole issue briefed in Thomas was whether the trial court's various verdict-urging statements had a coercive effect under all the circumstances, and the questions of per se use of the Allen charge and this Court's supervisory powers were not presented.

All of these factors are present in and underly the instant appeal. Those factors and this appeal should be considered by this Court, en banc.

OTHER ISSUES

A. Trial Court Rulings.

This appeal questions the trial court's ruling that the defense would not be permitted to show (1) that appellant was arrested for the robbery charged herein only

after the arresting officer, who was in doubt, learned that appellant was wanted by the police on a homicide warrant, and (2) that the prosecution of appellant for robbery began only after the homicide charge was dropped and without the exercise of appropriate prosecutorial discretion or judgment. The Panel's opinion upheld the trial court's ruling for two reasons: first, that the evidence was irrelevant and prejudicial to appellant; and second, that the determination to prosecute after arrest is within the discretion of the prosecutor.

We respectfully submit that the Panel has overlooked or misapprehended the facts, and the argument based on those facts. First, it is for the defense to determine if certain factors, otherwise relevant, are too prejudicial to the defense. The defense at trial fully weighed the prejudice which might result if the jury were to be informed of the existence of the homicide warrant, and the defense judgment was to incur the prejudice, if any. As to relevance, Appellant's Brief filed herein (pp. 35-36 and 39-47) amply shows that it was necessary to raise the fact of the homicide warrant to demonstrate all of the factors going into the police decision to charge appellant rather than the complainant -- who was proven at trial to have been guilty of carrying a concealed and dangerous weapon and of stabbling appellant. The complainant's proven motive for claiming that he had been robbed -- to divert attention away from his own criminal conduct -- was extremely relevant for proper jury assessment of his credibility, which credibility was artificially enhanced by the false impression that the arresting officer, who testified, had no doubts about who should have been arrested. As part of the res gestae it should have been considered by the jury.

The Panel's reliance upon traditional principles of prosecutorial discretion and judgment fails to consider an important fact in this case. Such discretion

or judgment was never exercised in this case. The record demonstrates that the usual and customary hearing by the United States Attorney's Office, prior to charging, was not conducted because of preoccupation with the homicide charge and the delays incident thereto. The record herein makes a strong prima facie case that prosecution of appellant for robbery, like his arrest, sprang from his alleged involvement in a homicide, and no discretion whatsoever was exercised or even considered by the prosecutors involved. This factor was at least subject to exploration in the trial court to insure compliance with due process, if not subject to exploration before the jury to show the unstable underpinning of the Government's case.

B. Corroboration.

This appeal questions whether some corroboration, at least a scintilla, should be required where a complainant's testimony is riddled with inconsistencies, impeached on cross-examination, and proven to be the testimony of a person as to whom prosecution had been withheld on a charge of carrying a dangerous and concealed weapon, and possibly assault with a dangerous weapon. The Panel Opinion misapprehended the issue presented. The Panel Opinion (Footnote 1, page 1) states the issue as follows:

> "Appellant also argues that the testimony of a complaining witness in a robbery trial must be corroborated before the case may go to the jury."

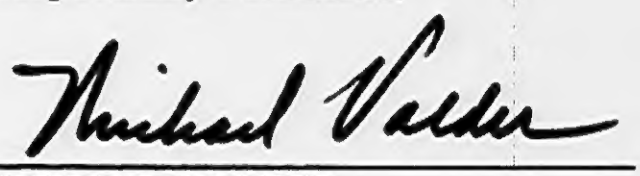
The foregoing is how the Government in its Brief and upon oral argument misstated appellant's contention. We have never contended for a corroboration requirement in all robbery cases. We have contended that the complainant's testimony in this robbery case required corroboration. Our emphasis has always been upon this complainant's

testimony, and not on the fact that this is a robbery case. Focussing on his inconsistent and impeached testimony, and upon the complainant's proven motive for false accusation, this Court, like the trial court, is asked only to examine whether traditional requirements of corroboration in other cases (e. g. sex crimes, with identical possibilities for, but not requiring actual proof of false accusations) should have been applied in testing the sufficiency of the Government's case herein.

CONCLUSION

WHEREFORE, this appeal should be reheard by this Court, en banc, and the Panel's Opinion filed on February 10, 1971 should be reconsidered. The conviction appealed from should be reversed.

Respectfully submitted,



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February 24, 1971

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 1971 I caused two copies of the foregoing to be hand delivered to the office of John A. Terry, Esquire, Assistant United States Attorney, United States Courthouse, Washington, D. C.; that a copy was also hand delivered on the same date to the office of John B. Kenkel, Esquire, 1225 Connecticut Avenue, N. W., Washington, D. C., attorney for appellant in U. S. v. Thomas (No. 22,768); and that a copy was also hand delivered, on the same date, to the office of Jerome I. Chapman, Esquire, 1229-19th Street, N. W., Washington, D. C., Attorney for appellants in U. S. v. Wilson and Whittaker (Nos. 23,094 and 23,095).

Michael J. Valder

MICHAEL J. VALDER